

# **Edward G. Horvath v. U.S. General Accounting Office**

**Docket No. 12-211-17-81**

**Date of Decision: March 30, 1982**

**Cite as: Horvath v. GAO (3/30/82)**

**Before: Simmelkjaer, Presiding Member**

**Prohibited Personnel Practices**

## **Background**

This case came before the Board by a Petition for Review dated November 17, 1981, addressed to the Board's General Counsel. On January 8, 1982, the General Counsel to the Board advised the Petitioner that the investigative phase was completed and advised him of his right to file a Petition for Review with the Board. In a letter dated January 13, 1982, received by the Board on January 18, 1982, the Petitioner exercised his right of review. This request for review was filed pro se.

On January 21, 1982, the Board received a Motion for Discovery from the Petitioner requesting certain documents which were in the custody of the Respondent. Then, on January 22, 1982, the Board received a Motion to Dismiss from the Respondent. On January 29, 1982, the Board received the Petitioner's response to the motion to dismiss. Finally, on February 2, 1982, the Board received the Respondent's Production of Documents which were requested in the Petitioner's motion for discovery.

Since the Petitioner in his January 29, 1982 response to the motion to dismiss waived his right to a hearing, this matter has been evaluated solely on the basis of the record before the Board.

## **Findings of Fact**

Petitioner serves as a Management Assistant, GS-344-7, within the Legal Information and Reference Service of the Office of the General Counsel. According to the Petitioner his immediate supervisor, Kathleen Wannisky, Special Assistant to the General Counsel and Chief of the Legal Information and Reference Service, advised him in the Fall of 1981 of the necessity to reassign him to other functions within the office. He was informed that three alternative assignments were available: (1) Editor in the Index-Digest Section, (2) Paralegal-Researcher in the Index-Digest Section, or (3) assisting the Chief of the Index and Files Section. Since the two positions in the Index-Digest Section were in a job series with grade potential to GS-9, the Petitioner indicated a preference for either position.

Accordingly, on October 5, 1981, the petitioner met with Stasia V. Hayman, Chief of the Index-Digest Section, to discuss his beginning work in a paralegal capacity. The record does not indicate whether this new assignment was by detail or reassignment, but according to the Petitioner, Personnel subsequently prepared documentation treating this assignment as a detail. He began work on October 6, 1981.

The Respondent agency on October 15, 1981, issued Job Opportunity Announcement No. C-82-802 for the position of Paralegal Specialist, GS-950-7/9, within the Index-Digest Section, Legal Information and Reference Service. The Petitioner applied for the position. However, he indicated in Block No. 13 on the

SF-171 that the lowest grade he would accept was the GS-9. On November 6, 1981, the Petitioner was interviewed by Ms. Hayman for the position. On this same day, Ms. Hayman selected the Petitioner for the position, at the GS-7 level.

The following workday, November 9, 1981, Christine Wesley, Personnel Management Specialist within the Personnel Office of the agency, notified the Petitioner that he had been selected for the position at the GS-7 level. She stated that it would be necessary for him to initial a change in his SF-171 application in order to accept the position at the GS-7 level. However, believing that he was fully qualified for the position at the higher grade level and that it should have been offered to him at that level, the Petitioner declined to accept the position. Although both his immediate supervisor, Ms. Hayman, and his second level supervisor, Ms. Wannisky, attempted to persuade the Petitioner to accept the position at the GS-7 grade level (with the understanding that if he performed satisfactorily in the position he would be considered for promotion to the GS-9 level), the Petitioner steadfastly refused. Subsequently, for budgetary reasons, the Job Opportunity Announcement was cancelled by the Acting General Counsel by memorandum to Ms. Wesley of the Personnel Office dated November 12, 1981.

### **Contentions of the Parties**

The Petitioner asserts that the actions of the Respondent agency violated a number of Merit System principles set forth in 4 C.F.R §§2.4, 2.5(d), 2.5(e), 2.5(f), and 2.5(h). The Petitioner suggests that in offering him the position at the GS-7 grade level, the agency had failed to consider adequately his qualifications and that the Respondent abused its discretion in not offering the position to the Petitioner at the higher grade level. As a remedy, the Petitioner requests that he be retroactively promoted to the GS-9 level as of November 15, 1981. Secondly, the Petitioner seeks clarification of the Respondent agency's "overexercise of discretion involving competitive selection of GAO employees."

The Respondent, in its motion to dismiss, contends that the Petitioner has failed to allege or establish that the actions of the agency, in offering the position to the Petitioner at the GS-7 level, constituted a prohibited personnel practice. The Respondent further asserts that when a vacancy is announced at more than one grade level, it has discretion to offer the position to a qualified candidate at either grade. Hence, the Respondent concludes that the offer of the position to the Petitioner at the lower grade was a reasonable exercise of its discretion.

### **Analysis**

The provisions of the agency regulations cited by the Petitioner are based upon Public Law 96-191 (February 15, 1980) which created the present personnel management system within the Respondent agency. Specifically, Section 3(b)(1) requires the agency to observe the Merit System principles and avoid the prohibited personnel practices set forth in sections 2301 and 2302, respectively, of title 5 of the United States Code. Since the regulations cited by the Petitioner are based on these statutory provisions, they must be construed as favoring the fair and proper application of agency discretion in all aspects of personnel management. For example, in filling vacancies, the cited statutes and regulations require the agency to evaluate fairly all applicants before ultimately selecting a candidate to fill a vacant position.

In reviewing Job Opportunity Announcement No. C-82-802 issued on October 15, 1981, it is obvious that such discretion was subject to various criteria set forth in the "Remarks" portion of the announcement. Specifically, in addition to listing basic qualifications for applicants, the "Remarks" portion of the announcement indicated that applicants would have to meet the time-in-grade requirements and that

qualified candidates would be evaluated on the basis of four factors: Effectiveness appraisal, quality of experience, education and job related training, and job-related awards. Additionally, the remarks portion of the announcement indicated that:

“Applicant selected at the GS-7 level has promotion potential to the GS-9 level without further competition. Applicant selected at the GS-9 level is at the full performance level.

On November 6, 1981, Ms. Hayman after observing and supervising the petitioner’s work for approximately four weeks, selected him for the position at the GS-7 level.

The Petitioner does not dispute that he was selected for the position at the GS-7 level or that he was advised by both his first and second level supervisors that, consistent with the announcement, he would be considered for promotion at the higher grade level at a later date. Rather, the Petitioner contends that he should have been offered the position at the higher grade level and implies that the selecting official did not exercise appropriate discretion in offering him the position at the GS-7 grade level.

The Board is reluctant to look behind the reasonable exercise of discretion by a supervisor in filling a vacant position at one of two grade levels permitted by a vacancy announcement, particularly in the absence of such a showing of misconduct or impropriety by the selecting official. In the absence of such a showing, the Petitioner has failed to establish a valid claim.

A review of the entire record, particularly in the light of the language contained in the job opportunity announcement and the efforts by the Respondent agency to persuade the Petitioner to accept the position at the GS-7 level, with promotion potential, indicates that a good faith effort was made by the agency to place the Petitioner. The Board Member also finds that the selection of Petitioner for the position of paralegal Specialist, GS-950-7, was a reasonable exercise of managerial discretion. Therefore, the Board Member finds no violation of the cited statutes and regulations pertaining to merit system principles and prohibited personnel practices.

### **Decision**

The Petitioner’s appeal to the Board for review and approval of a retroactive promotion to November 15, 1981, is denied and his appeal is dismissed.